U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 December 2003

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In the Matter of:

CHARLES H. PHILLIPS,
Claimant,

v. **Case No. 2002-BLA-05289**

WESTMORELAND COAL COMPANY,
Employer, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

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Appearances:

Joseph Wolfe, Esq., Wolfe, Williams & Rutherford, Norton, VA
For Claimant

Douglas Smoot, Esq., Jackson & Kelly, Charleston, WV
For Employer

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, ***et. seq***. (hereafter "the Act") filed by Claimant Charles H. Phillips ("Claimant") on May 14, 2001. The instant claim is the first claim filed by Claimant. The putative responsible operator is Employer Westmoreland Coal Company ("Employer"). Benefits are currently being paid by the Black Lung Disability Trust Fund.

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also applicable, as this claim was filed after January 19, 2001. 20 C.F.R. § 718.2. In ***National Mining Assn. v. Dept. of Labor***, 292 F.3d. 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected a challenge to, and upheld, the amended regulations with the exception of several sections which were found to be impermissibly retroactive and one which attempted to

effect an unauthorized cost shifting.[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record, including all evidence admitted and arguments made. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant filed the instant claim, his first, on May 14, 2001. (DX 1). Following an October 11, 2001 examination conducted by Dr. J. Randolph Forehand (DX 11), the claims examiner issued a January 30, 2002 Schedule for the Submission of Additional Evidence, which indicated that the Claimant would be entitled to benefits if a decision were issued at that time and that Westmoreland Coal Company was the responsible operator. (DX 23). Employer disagreed with the scheduling order (DX 26) and submitted the September 19, 2001 examination report of Dr. A Dahhan. (DX 27). The district director issued a Proposed Decision and Order awarding benefits on May 6, 2002. (DX 36). The Employer declined to pay benefits and requested a hearing, so the Trust Fund began paying benefits. (DX 39, 40). The case was transmitted for a hearing on June 26, 2002. (DX 42).

A hearing was held in the instant case on December 12, 2002 in Abingdon, Virginia. At the hearing, Director's Exhibits 1 through 42, Claimant's Exhibits 1 through 6, and Employer's Exhibits 1 through 5 and 7 were admitted into evidence, and the record was left open until January 13, 2003, for the transcript of Dr. Branscomb's deposition to be admitted as Employer's Exhibit 6, with briefs or written closing arguments to be filed by February 20, 2003.[2] Employer filed Employer's Exhibit 6 in a timely manner and also submitted a timely written closing argument. Along with Employer's Exhibit 6, Employer, without explanation, sought to submit additional records (consisting of Dr. Branscomb's readings of various x-rays) as Employer's Exhibit 8. Inasmuch as Employer's Exhibit 8 is not within the purview of the purpose for which the record was held open it is **STRICKEN**, Employer's Exhibit 6 is hereby admitted into evidence, and the record is now closed. **SO ORDERED.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The issues listed on the CM-1025 transmittal form include length of coal mine employment, existence of pneumoconiosis, its causal relationship with coal mine employment, total disability, causation of total disability, and responsible operator. (DX 42). In addition, the issues raised in the February 8, 2002 Response to Scheduling Order (primarily involving challenges to the regulations for appellate purposes) were listed as additional issues.) (DX 26; Tr. 6-7).

At the hearing, Employer stipulated to at least 25 years of coal mine employment, although the Claimant claims 44 years and the Director found 37.26 years. (Tr. 6). Further,

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[1] The only one of the impermissibly retroactive regulations pertinent to the instant case is 20 C.F.R. §718.204(a) (relating to total disability and providing that unrelated nonpulmonary or nonrespiratory conditions causing disability will not be considered in determining whether a miner is totally disabled due to pneumoconiosis); however, the amended rule is consistent with existing Fourth Circuit precedent.

[2] References to the Director's Exhibits, Claimant's Exhibit, and Employer's Exhibits, admitted into evidence at the hearing and herein, appear as "DX," "CX", and "EX," respectively, followed by the exhibit number. References to the hearing transcript appear as "Tr." followed by the page number.

Employer indicated that it would probably be able to withdraw the responsible operator issue if the Claimant testified that he had not worked anywhere else after Westmoreland. (Tr. 6-7). Claimant so testified and I find that Westmoreland Coal Company was properly named as responsible operator.

Medical Evidence

At the hearing, the parties agreed to waive the evidentiary limitations set forth in the new regulations under 20 C.F.R. §§ 725.414, 725.456, and I accepted the stipulation by the parties to that effect. (Tr. 24, 28). Upon further reflection, my acceptance of the stipulation may have been improvidently granted, as the regulations require a showing of good cause. As the Benefits Review Board has allowed the parties to waive objections to documentary evidence not being in compliance with regulatory requirements, I will not alter my ruling at this time. ***See Dankle v. Duquesne Power***, 20 B.L.R. 1-1 (1995). However, the parties are advised that such stipulations are unlikely to be accepted by the undersigned administrative law judge in the future.

The medical evidence consists of the following: seventeen readings of four x-rays taken on September 18, 2001, October 11, 2001, July 17, 2002, and August 1, 2002 (DX 11, 27; CX 1; EX 1, 4, 5); the results of pulmonary function studies taken on March 29, 2001, September 18, 2001, October 11, 2001, July 17, 2002, and August 2, 2002 (DX 11, 27; CX 1; EX 1); arterial blood gases taken on March 29, 2001, September 18, 2001, October 11, 2001, July 17, 2002, and August 2, 2002; two interpretations of a CT scan taken on March 15, 2001 (CX 1, EX 5); diffusion capacity readings for March 29, 2001, September 18, 2001, July 17, 2002, and August 5, 2002 (DX 27, CX 1, EX 1); the medical examination reports of Dr. Robinette, based upon March 15, 2001 and August 1, 2002 examinations (CX 1), of Dr. Dahhan, based upon a September 18, 2001 examination (DX 27), of Dr. Forehand, based upon an October 11, 2001 examination (DX 11); and of Dr. Castle, based upon a July 17, 2002 examination (EX 1); the review reports and supplemental reports of Drs. Robinette, Branscomb, and Spagnolo (CX 1, EX 1, 2, and 3); and the transcripts of the depositions of Drs. Branscomb and Castle (EX 6, 7).

Claimant's Testimony

At the time of the hearing, Claimant was 63 years old. (Tr. 8). He was married and his wife's name was Peggy Short Phillips. (Tr. 9). He was a credible witness.

Claimant was on an oxygen machine at the time of the hearing, and he indicated that he had been on oxygen since about 1991. (Tr. 8). He explained that he used oxygen to sleep at night and was also supposed to use it whenever he walked as much as 200 feet. (Tr. 16). When asked whether he would be able to work in the mines, he testified that he knew he could not because he could hardly walk without oxygen. (Tr. 16). Claimant testified that he was on three different inhalers. (Tr. 18-19).

Claimant testified that Westmoreland Coal Company was his last coal mine employer and that he had not worked anywhere else since. (Tr. 17). His employment with Westmoreland ended on October 1, 1994, and he last worked as a surface utility man, loading and unloading the dump trains and working at the truck dump. (Tr. 8). When he started working for Westmoreland in 1969, he was employed as a roof bolter or pinner, and he also worked on the miner and as a miner helper. (Tr. 10). He provided a history of his prior coal mine employment in various underground coal mines in Virginia and Kentucky from the 1950's until he started working for Westmoreland in 1969. [3] (Tr. 10-14).

[3] Although the Claimant testified that he first worked for Charles Woody Coal Company in 1953, he only worked there for one day. (Tr. 10-11). The Social Security earnings records reflect earnings of $20 for that employer

Claimant testified that he used to be a cigarette smoker but that he had not smoked at all for 14 years, or since 1988. (Tr. 14-15). He started smoking at age 22 (in 1957), after he was married. (Tr. 17). During the period of time that he smoked, Claimant testified that he smoked approximately one half pack daily. (Tr. 15). Thus, Claimant has a 15-pack-year smoking history based upon his recent testimony.

While I recognize that the accounts given in certain records may vary from the smoking history given by Claimant, I witnessed Claimant's demeanor and found him to be a credible witness.[4] Accordingly, I find that he had an approximately 15-pack-year smoking history, ending before 1990.

On the issue of the length of the Claimant's coal mine employment, I find that the Claimant had 53 quarters of coal mine employment in addition to the 25 years that he spent with Westmoreland, amounting to 38 1/4 years of coal mine employment from 1956 until 1994.

Discussion and Analysis

To prevail in a claim for Black Lung benefits, a claimant must establish that he or she suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he or she is totally disabled, as defined in section 718.204; and that the total disability is due to pneumoconiosis. 20 C.F.R. §§718.202 to 718.204. The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. In ***Director, OWCP v. Greenwich Collieries***, 512 U.S. 267 (1994), the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. Thus, in order to prevail in a black lung case, the claimant must establish each element by a preponderance of the evidence.

Existence of Pneumoconiosis

The regulations (both in their original form and as revised effective January 19, 2001) provide several means of establishing the existence of pneumoconiosis. (1) a chest x-ray meeting criteria set forth in 20 C.F.R. §718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting the x-rays; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. §718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" set forth in 20 C.F.R. §718.304 (or two other presumptions set forth in §718.305 and §718.306); or (4) a

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(which I find is insufficient to be counted). The Claimant was not employed as a coal miner again until 1956, when he worked for Bolling Brothers Coal Co. and Lease Hollow Coal Co. (for Mack Glenn & Charles Sturgill), but he worked regularly as a coal miner thereafter. (DX 7).

[4] Although the history Claimant gave at the hearing is consistent with the one he gave to Drs. Forehand, Dahhan, and Castle, Dr. Robinette recorded that he smoked between one and one-and-one-half packs of cigarettes daily during the time that he smoked, amounting to a "35 pack year smoking history at most" ending 12 years earlier. (CX 1). In his interrogatory responses, Claimant indicated that he had smoked for 30 years and that on the average, he had in the past smoked 1/2 pack per day, with the most he ever smoked as 1 pack. In the remainder of that subpart, when asked how many years he smoked that much, he put down "58-86 – 28 years." (DX 30). These responses are contradictory, as if he smoked one pack daily for 28 years he could not have smoked an average amount of 1/2 pack per day over a 30 year period. I reconcile these contradictions by accepting the Claimant's testimony. Based upon the record before me and Claimant's credible testimony, I must conclude that Dr. Robinette's entry was in error.

determination of the existence of pneumoconiosis as defined in §718.201 made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. §718.202(a)(1)-(4). Under section 718.107, other medical evidence, and specifically the results of medically acceptable tests or procedures, may be submitted and considered. In the recent amendments to the regulations, the definition of pneumoconiosis in §718.201 has been amended to provide for "clinical" and "legal" pneumoconiosis and to acknowledge the latency and progressiveness of the disease.

X-ray Evidence. Turning first to the x-ray evidence, it is overwhelmingly positive for simple coal worker's pneumoconiosis:[5]

Exhibit No.	Date of x-ray/Reading	Physician/Qualifications	Interpretation
DX 27	09/18/01/ same	A. Dahhan, B-reader	Pneumo. q/q, 1/1, all six zones, emphysema
EX 5	same/ 07/22/02	J. Wiot, B-reader, BCR	Pneumo. q/t, 2/2, all six zones, emphysema
CX 4	same/ 10/08/01	W. Scott, B-reader, BCR	Pneumo. t/q, 2/1, upper 4 zones, possible emphysema or tuberculosis
CX 5	same/ 10/18/01	Y. Kim, B-reader, board-certified radiologist[6]	Pneumo. q/t, 1/2, upper 4 zones, emphysema
DX 11	10/11/01/ same	J. Forehand, B-reader	Pneumo. q/q, 2/2, upper 4 zones
EX 4	same/ 10/27/01	J. Scatarige, B-reader, BCR	No pneumo.; emphysema
EX 5	same/ 08/12/02	J. Wiot, B-reader, BCR	Pneumo. q/t, 2/2, all six zones, emphysema
EX 5	same/ 10/06/02	C. Meyer, B-reader, BCR	Pneumo. q/q, 2/1, upper 4 zones, emphysema
EX 5	same/ 10/25/02	W. Scott, B-reader, BCR	Pneumo. t/q, 1/1, upper 4 zones, emphysema, possible tuberculosis
EX 5	same/ 10/26/02	P. Wheeler, B-reader, BCR	Pneumo. q/q, 1/0, upper 4 zones, tuberculosis, possible emphysema
CX 2	10/29/01?/ 10/30/01?[7]	K. Deponte, B-reader, BCR	Pneumo. q/r, 2/1, all six zones, emphysema
EX 1	07/17/02/ 08/ 05/02	J. Castle, B-reader	Pneumo., r/q, 1/2, upper 4 zones, emphysema
EX 5	same/ 09/16/02	J. Wiot, B-reader, BCR	Pneumo. q/t, 2/2, all six zones, emphysema
EX 5	same/ 10/09/02	P. Wheeler, B-reader, BCR	? Pneumo. q/s, 0/1, upper 4 zones, tuberculosis, possible emphysema
EX 5	same/ 10/09/02	W. Scott, B-reader, BCR	? Pneumo. q/t, 0/1, upper 4 zones, emphysema, tuberculosis
EX t	same/ 10/09/02	J. Scatarige, B-reader, BCR	Pneumo. q/r, 1/0, upper 4 zones, emphysema
CX 1	08/01/02/ same	R. Mullens, radiologist [other credentials not listed]	CWP/silicosis [not on ILO form]
CX 1	same/ same	E. Robinette, B-reader	Pneumo., r/u, 2/2, all six zones, emphysema, other symbols
EX 5	same/ 10/19/02	J. Wiot, B-reader, BCR	Pneumo. q/t, 2/2, all six zones, emphysema

[5] "BCR" means board certified radiologist.

[6] Where the record was unclear, I have consulted the website of the American Board of Medical Specialties (ABMS) (www.abms.org) for information on credentials.

[7] Claimant's counsel suggested that Dr. Deponte had transposed the dates on the ILO form. (Tr. 21).

Thus, Claimant has established pneumoconiosis under 20 C.F.R. §718.202(a)(1).

Biopsy Evidence. As there is no biopsy evidence of record, Claimant has failed to establish the presence of the disease under 20 C.F.R. §718.202(a)(2).

Complicated Pneumoconiosis and Other Presumptions. A finding of opacities of a size that would qualify as "complicated pneumoconiosis" under 20 C.F.R. §718.304 results in an irrebuttable presumption of total disability. As there is no evidence of complicated pneumoconiosis, the section 718.304 presumption is inapplicable. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306 are also inapplicable, inter alia, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively, and section 718.306 only applies to death claims. Thus, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(3).

Medical Opinions on Pneumoconiosis. Claimant has also established the existence of the disease under 20 C.F.R. §718.202(a)(4) based upon medical opinion evidence. In this regard, in addition to the x-ray readings, six physicians have offered medical opinions addressing the issue of whether the Claimant has pneumoconiosis – Drs. Emory Robinette, Abdul Dahhan, J. Randolph Forehand, James Castle, Ben Branscomb, and Samuel Spagnolo. Each of these physicians (with the exception of Dr. Spagnolo, who merely conceded the possibility) agreed that the Claimant has simple coal worker's pneumoconiosis or "clinical pneumoconiosis." However, the doctors disagree as to whether the Claimant's disability is primarily due to obstructive lung disease (including bronchitis and/or emphysema) and the extent to which that condition may be attributed to cigarette smoking alone. To the extent that the Claimant also has an obstructive lung disease that was caused by his coal mine dust exposure, it can be compensable as "legal pneumoconiosis."

As amended, the regulations define legal pneumoconiosis as including any chronic restrictive or obstructive pulmonary disease "arising out of coal mine employment," which includes pulmonary or respiratory diseases or impairments "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). Notably, in amending the regulations, the Department of Labor discussed the strong epidemiological evidence supporting an association between coal dust exposure and obstructive pulmonary disability (65 Fed. Reg. 79937-79945 (Dec. 20, 2000)), but it nevertheless chose to require that each individual claimant establish by a preponderance of the evidence that such an association occurred in that individual's case. ***Id.*** at 79938. The medical opinions on this issue consist of the following:

(1) Dr. J. Randolph Forehand, a board certified allergist and immunologist and pediatrician (with board eligibility in pediatric pulmonary medicine), diagnosed coal workers' pneumoconiosis and chronic bronchitis, which he attributed to coal dust exposure and cigarette smoking. He noted the absence of emphysema on x-rays (although, as noted on the chart above, other readers disagreed) and he found most of the disability due to coal dust exposure with any contribution by smoking-related chronic bronchitis to be less important. (DX 11).

(2) Dr. Emory Robinette, a board certified pulmonologist,[8] found the Claimant to be suffering from coal worker's pneumoconiosis and severe obstructive lung disease and, while he found the Claimant to be suffering from totally disabling "occupational pneumoconiosis," he did not squarely address the issue of the relative contributions by the Claimant's coal mine dust exposure and his smoking history to the obstructive lung disease. (CX 1).

(3) Dr. Abdul Dahhan, a board certified pulmonologist, diagnosed simple coal worker's pneumoconiosis as well as chronic obstructive lung disease (consisting of chronic bronchitis and emphysema); he attributed the latter condition solely to Claimant's smoking history. (DX 27).

(4) Dr. James Castle, a board certified pulmonologist, found evidence of simple coal worker's pneumoconiosis and pulmonary emphysema. He attributed the latter condition to cigarette smoking. However, he opined that he could not exclude coal worker's pneumoconiosis as a contributing factor based upon the radiographic findings and degree of hypoxemia on exercise. (EX 1, 7).

(5) Dr. Ben Branscomb, a board certified internist, found sufficient evidence to justify a diagnosis of coal worker's pneumoconiosis as well as obstructive pulmonary disease and emphysema, which he found to be disabling. He opined that the impairment was neither caused nor aggravated by coal mine dust exposure. (EX 2, 6).

(6) Dr. Samuel Spagnolo, a board certified pulmonologist and critical care medicine specialist, found possible coal worker's pneumoconiosis as well as severe airflow obstruction and bullous emphysema attributable to a 30-year smoking history. He found that coal dust exposure did not aggravate the Claimant's condition. (EX 3).

Thus, the medical opinions fall short of establishing that the Claimant has legal pneumoconiosis (e.g., chronic obstructive pulmonary disease, emphysema or bronchitis) attributable to his coal mine dust exposure. However, as noted above, the medical opinion evidence supports a finding of clinical pneumoconiosis.

Accordingly, the Claimant has satisfied his burden of establishing pneumoconiosis under subsection (a)(4) of section 718.202, based upon the consensus of the medical practitioners that he has simple coal workers pneumoconiosis.

Other evidence on Pneumoconiosis. In addition to the above, there was a CT scan taken on March 15, 2001, which was interpreted by Dr. Mullins as showing "[n]odular interstitial lung disease consistent with CWP/silicosis," and Dr. Wiot noted findings consistent with simple coal workers' pneumoconiosis. (CX 1, EX 5). The CT scan evidence also supports a finding of clinical pneumoconiosis.

All Evidence on Pneumoconiosis. Taking into consideration all of the evidence on the issue of the existence of pneumoconiosis, including the x-ray interpretations, medical opinions,

[8] Because Dr. Robinette's credentials were unclear, I consulted the ABMS website. Although a curriculum vitae was submitted, it begins with paragraph "V" and omitted the information concerning board certifications (CX 1).

and CT scan interpretations, I find that the Claimant has established clinical pneumoconiosis under section 718.204(a) by a preponderance of the evidence.

Causal Relationship with Coal Mine Employment

As Claimant has proven that he suffers from pneumoconiosis and that he has worked more than ten years in the coal mines, he has established that his pneumoconiosis arose out of his coal mine employment under the rebuttable presumption contained in 20 C.F.R. § 718.302. Additionally, irrespective of the presumption, Claimant has proved the same through the medical evidence submitted.

Total Disability

The regulations as amended provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. §718.204(b)(1). Where, as here, there is no evidence of complicated pneumoconiosis, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment. 20 C.F.R. §718.204(b)(2). For a living miner's claim, it may not be established solely by the miner's testimony or statements. 20 C.F.R. §718.204(d)(5).

According to his testimony and written submissions, Claimant was last employed as a surface utility man, in which capacity he loaded dump trains. He regularly lifted and carried items weighing between one and sixteen pounds, and occasionally was required to lift or carry 50 pounds. (DX 3; ***see also*** DX 30). As noted above, Claimant credibly testified that he would be unable to perform that job due to his need for oxygen with any kind of exertion. It is clear that the Claimant has established total disability under any of the subparagraphs of section 718.204(b)(2):

Pulmonary function tests. Under subparagraph (i), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if, in addition, the tests reveal qualifying FVC or MVV values under the tables, or an FEV1/FVC ratio of less than 55%. The pulmonary function tests produced the following values, pre/ post bronchodilator:

Date	Exhibit No.	FEV1	FVC	MVV	FEV1/FVC
03/29/01	CX 1	1.34/ 1.51	3.01/ 3.56	--	44%/ 42%
09/18/01	DX 27	1.09/ 1.32	2.49/ 2.88	19/ 32	44%/ 46%

10/11/01	DX 11	1.22/ 1.40	2.63/ 3.29	30/ 54	46%/ 42%
07/17/02	EX 1	1.08/ 1.32	3.10/ 3.49	35	35%/ 38%
08/02/02	CX 1	1.08/ 1.30	2.94/ 3.22	--	37% / 40%

These values are all qualifying under the criteria set forth in 20 C.F.R. Part 718, Appendix B for Claimant's recorded height of 65 inches and ages of 66 (for the first three tests) and 67 (for the last two tests). Accordingly, I find the pulmonary function tests support a finding of total disability and therefore Claimant has satisfied his burden of proof under section 718.204(b)(2)(i).

Arterial blood gases. The arterial blood gases produced the following values (rest/exercise):

Date	**Exhibit No.**	**pCO2**	**pO2**
03/28/01	CX 1	38/ 38	69/ 51
09/18/01	DX 27	40.4 / 41.8	65.7/ 60.7
10/11/01	DX 11	42/ 35	54/ 51
07/17/02	EX 1	39.1/ 38.3	61.3/ 51.1
08/02/02	CX 1	39 (rest)	59 (rest)

Although three of the tests were nonqualifying at rest, three of the four exercise tests produced qualifying values under the regulatory standards set forth in 20 C.F.R. Part 718, Appendix C. For the September 2001 test, the values were taken after exercise rather than during, as required by the regulations, so those values are of little significance. Moreover, the most recent test is qualifying at rest. Based upon consideration of all of these test results, I find that Claimant has satisfied section 718.204(b)(2)(ii).[9]

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale or congestive heart failure, so Claimant has not established total disability under section 718.204(b)(2)(iii).

Medical opinion. The newly submitted medical opinion evidence consists of the medical examination reports of Drs. Forehand, Dahhan, Castle, and Robinette, and the written medical opinions of Drs. Branscomb and Spagnolo. Of these physicians, only Dr. Spagnolo felt that the Claimant retained the respiratory capacity to perform his last regular coal mining job or work requiring similar effort. I do not find his report to be well reasoned and I find the opinions of Drs. Forehand, Dahhan, Castle, Robinette and Branscomb to the effect that the Claimant it totally disabled from returning to his last coal mine job to be better reasoned, persuasive, and consistent with the clinical evidence. Thus, the medical opinion evidence also establishes total disability under section 718.204(b)(2)(iv).

Other evidence. The only other evidence of note consists of the diffusing capacity test results for four tests taken between March 2001 and August 2002, which are reduced. (DX 27.

[9] As the values are qualifying overall, I do not need to assess the impact that the oxygen Claimant was receiving may have had on the test results.

CX 1, EX 1). Inasmuch as the regulations do not address the proper interpretation of these values, they add little to the medical opinions that address them.

Section 718.204(b)(2) as a whole. Looking at section 718.204(b)(2) as a whole, I find that total disability has clearly been established by the evidence considered together, including the pulmonary function tests, arterial blood gases, and medical opinions. Accordingly, Claimant cannot establish total disability and therefore cannot establish a condition of entitlement.

Causation of Total Disability

After establishing that the miner was totally disabled, a claimant must still establish that the miner's total disability was caused by his or her coal mine employment. 20 C.F.R. §718.204(a). If the presumptions are not available to a claimant, that claimant must prove the etiology of the disability by a preponderance of the evidence, even if he or she has proven the existence of total disability. ***See Tucker v. Director***, 10 B.L.R. 1-35, 1-41 (1987). Under the amended regulations, the finder-of-fact must not take into account any non-pulmonary or non-respiratory impairments a miner may have when making this determination, unless said condition causes a chronic respiratory or pulmonary impairment. 20 C.F.R. §718.204(a). In meeting this last requirement, a claimant must show that "pneumoconiosis . . . is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment," which means that it had a material adverse effect on the miner's respiratory or pulmonary condition or that it materially worsened a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. § 718.204(c)(1).

Under the old regulations, the U.S. Court of Appeals for the Fourth Circuit held that a miner's pneumoconiosis must be at least a "contributing cause" of his or her totally disabling pulmonary impairment. ***Jewell Smokeless Coal Corp. v. Street***, 42 F.3d 241 (4th Cir. 1994); ***Hobbs v. Clinchfield Coal Co.***, 917 F.2d 790 (4th Cir. 1990); ***Robinson v. Pickands Mathur & Co.***, 914 F.2d 35 (4th Cir. 1990). In ***Robinson***, the Fourth Circuit explained, based upon the old version of the regulations, that the pneumoconiosis must be a necessary condition of a miner's disability, and if he would have been disabled to the same degree and by the same time in his life if he had never been a miner, then benefits should not be awarded.

There is a slight difference in the new regulations, which allow for a finding of total disability due to pneumoconiosis even when there is another totally disabling respiratory or pulmonary condition if pneumoconiosis has a material adverse effect or materially worsens an unrelated total respiratory or pulmonary disability. ***See*** 20 C.F.R. § 718.204 (2001).[10] This provision is relevant to the instant case, as Employer is arguing that the Claimant's pulmonary or respiratory disability is entirely due to his cigarette smoking history.

Employer now argues that the new regulations place an additional burden upon the Claimant to establish a substantial contribution by pneumoconiosis and cites the Department's

[10] As noted above, in ***National Mining Assn. v. Dept. of Labor***, 292 F.3d. 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit found the portion of 20 C.F.R. § 718.204(a) providing that unrelated nonpulmonary or nonrespiratory conditions causing disability will not be considered in determining whether a miner is totally disabled due to pneumoconiosis to be impermissibly retroactive.

comment in the preamble to the regulations that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." Westmoreland Coal Company's Closing Argument at 4, citing 65 Fed. Reg. 79,946 (Dec. 20, 2000).

The Benefits Review Board recently had an opportunity to examine this new provision in ***Gross v. Dominion Coal Corp.***, BRB No. 03-0118 BLA (Benefits Review Board, Oct. 29, 2003) (to be published).[11] In that decision (slip op. at 6 to 7), the Board held that an opinion (by Dr. Forehand) stating that pneumoconiosis was one of two causes of the miner's totally disabling pulmonary condition, but which did not attempt to specify the relative contributions of coal dust exposure and cigarette smoking, was sufficient to satisfy the new standard. The Board found that the doctor's opinion satisfied that "material adverse effect" requirement.[12]

Opinions have been offered on disability causation by the same physicians discussed above, Drs. Forehand, Robinette, Dahhan, Castle, Branscomb, and Spagnolo.

Of the physicians who examined the Claimant (Drs. Forehand, Dahhan, Castle, and Robinette), two – Drs. Forehand and Robinette -- primarily attributed the Claimant's total respiratory disability to his coal mine dust exposure. Dr. Robinette did not address a possible contribution by the miner's smoking history while Dr. Forehand discounted the possibility (although his comments were limited to bronchitis.) While these reports lack a detailed explanation of each physician's reasoning, they are nevertheless well founded and documented. Both doctors state unequivocally that the Claimant's disability is caused by pneumoconiosis and their opinions are sufficient under ***Gross.*** Dr. Robinette is board certified in internal medicine with a subspecialty in pulmonary diseases and Dr. Forehand, inter alia, in allergy and immunology, and each has extensive experience working with coal miners and their diseases, and their opinions are entitled to significant weight.

Dr. Dahhan, who is also board certified in pulmonary medicine and highly qualified by experience, disagreed with Drs. Robinette and Forehand, finding the miner's disability was entirely attributable to his smoking history and resulting "obstructive airway disease" (chronic bronchitis and emphysema) rather than "Category 1 simple pneumoconiosis."[13] Like Drs. Forehand and Robinette, Dr. Dahhan's discussion is sparse and, while he opined that the Claimant's coal mine employment did not cause or aggravate his obstructive airway disease, he did not comment upon whether, if the Claimant had category 2 pneumoconiosis, it would have produced any respiratory impairment. He also did not discuss whether the Claimant's hypoxemia and reduction in diffusing capacity resulted in any impairment. Dr. Dahhan's report leaves open more questions than it answers.

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[11] The decision is available on the BRB website, which may be accessed via a link from the OALJ website, www.oalj.dol.gov.

[12] The Board also found that substantial evidence supported the administrative law judge's discrediting of the opinion offered by the employer's expert (Dr. Castle) under ***Sterling Smokeless Coal Co. v. Akers,*** 131 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997), which held that an administrative law judge should consider the explanation provided by an expert offering an opinion.

[13] The preponderance of positive readings by highly qualified readers were for category 2 pneumoconiosis, as summarized above.

Dr. Castle, also an experienced, board-certified pulmonologist, found the Claimant's disability to be primarily due to cigarette smoking; however, in his report, he admitted he could not eliminate a possible contribution by coal mine dust. At his deposition, he explained that it could be a contributing factor but the possibility that it was a significant factor was low, and he went on to state that the Claimant would have the same degree of impairment if he had never been a miner. (EX 17-20). It became clear that Dr. Castle's opinion, at bottom, is based upon his assessment that simple pneumoconiosis is not disabling. In fact, he agreed with the statement that there were no signs or symptoms associated with simple coal miner's pneumoconiosis, even though he later conceded the possibility that simple coal worker's pneumoconiosis could be totally disabling – a contradiction. (DX 7 at 16-17, 21.) Moreover, Dr. Castle used an inflated smoking history of 30 years (deliberately discounting the 15- to 16-pack-year history he obtained from the Claimant) and he relied upon his own assessment of category 1 pneumoconiosis, when the x-ray evidence by the most qualified readers supports a finding of category 2. (EX 7 at 16 to 17). By assuming a higher smoking history and lower level of pneumoconiosis, his conclusions are questionable, as is his objectivity. Due to these circumstances, I assign less weight to Dr. Castle's opinion.

Dr. Branscomb, a board-certified internist, and Dr. Spagnolo, a board certified pulmonologist, did not examine the Claimant. While, as the trier of fact who is charged with the responsibility of weighing the evidence, I would not go so far as to automatically discredit their opinions on that basis, I nevertheless find that their inability to conduct a physical examination placed them at a disadvantage and therefore entitles their opinions to lesser weight. Inasmuch as Dr. Spagnolo felt that the Claimant retained the respiratory capacity to perform his last regular coal mining job or work requiring similar effort, he cannot comment on the cause of Claimant's total disability. In any event, I have already discounted his opinion based upon his unfounded conclusion that the Claimant could return to his job in the mines and I assign it no weight. It was difficult to understand what exactly Dr. Branscomb's opinion now is, as he repeatedly modified it at his deposition, and I did not find his discussion of the evidence to be in the least bit persuasive.[14] However, he conceded that coal worker's pneumoconiosis could have contributed to Claimant's disability, and that the possibility was as high as 20 percent. (EX 2, EX 6 at 83). In any event, I assign little weight to Dr. Branscomb's opinion.

In reviewing all of the medical opinions, recognizing the flaws in all of them, I find the conclusions by Drs. Robinette and Forehand to be most plausible upon review of the entire record. I find that they are sufficient to establish that coal workers' pneumoconiosis was a substantially contributing factor to the Claimant's total disability within the meaning of the regulations, notwithstanding the opinions to the contrary.

[14] For example, he first stated that the reduction in diffusing capacity indicated that the disability was most likely due to emphysema; then he conceded that coal dust exposure can cause such a reduction, but explained that category 2 pneumoconiosis would be insufficient to cause that effect; then he went on to say that there was a 20 percent probability that Claimant did not have CWP at all. (EX 6 at 36-37, 68-69, 83-84).

Conclusion

Having established all of the requisite elements of entitlement under the Act and regulations by a preponderance of the evidence, Claimant is entitled to receive benefits.

Onset Date

Under section 725.503(b), the date for commencement of benefits is "the month of onset of total disability," but "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." None of the medical evidence or testimony offered in connection with this claim conclusively establishes the precise date that Claimant first became totally disabled due to pneumoconiosis. Accordingly, benefits shall commence as of May 2001, the date Claimant first filed this claim for benefits. (DX 1).

Attorney's Fee

No award of an attorney's or representative's fee is made herein because no fee application has been received. ***See*** 30 U.S.C. § 932; 33 U.S.C. § 928. The Claimant's attorney shall have thirty days for submission of a fee application in conformance with 20 C.F.R. Part 725 and the other parties shall have thirty days to file any objections, provided that these dates may be extended upon the stipulation of the parties or for good cause shown.

ORDER

IT IS HEREBY ORDERED that the claim of Charles H. Phillips for black lung benefits be, and hereby is, **GRANTED** and Westmoreland Coal Company shall commence payment of benefits and shall reimburse the Trust Fund for interim benefits paid.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.